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Nos. 08-1498 and 09-89

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

HUMANITARIAN LAW PROJECT, ET AL.

HUMANITARIAN LAW PROJECT, ET AL.,
CROSS-PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENTS

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REPLY BRIEF FOR THE RESPONDENTS

I. THE MATERIAL-SUPPORT STATUTE'S RESTRICTIONS ON PROVIDING AID TO KNOWN TERRORIST ORGANIZATIONS DO NOT VIOLATE THE FIFTH AMENDMENT

A. The Court Of Appeals Confused The Vagueness And Overbreadth Doctrines

Petitioners make virtually no effort to defend the rationale on which the court of appeals rested its decision—namely, that the challenged terms are vague be-

cause they can "be read to encompass speech and advocacy protected by the First Amendment." Pet. App. 22a; see *id.* at 24a, 25a. That rationale conflates two distinct constitutional doctrines: vagueness and overbreadth. Gov't Br. 42-43; see *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 n.9 (1982) (*Village of Hoffman Estates*). Vagueness doctrine asks whether, for purposes of the Fifth Amendment, the contested terms in the material-support statute have a clear meaning to an ordinary person. Overbreadth doctrine asks whether, for purposes of the First Amendment, those terms reach an impermissible amount of constitutionally protected expression. The court below wrongly collapsed those separate inquiries.

The single sentence that petitioners devote to defending the court of appeals' reasoning asserts that this Court has "link[ed] * * * the doctrines when vague statutes implicate speech." Reply Br. 19. But this Court has linked the doctrines when a plaintiff challenges a statute as both facially vague and overbroad—*i.e.*, when a plaintiff "argue[s] that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech." *United States* v. *Williams*, 128 S. Ct. 1830, 1845 (2008); see *Village of Hoffman Estates*, 455 U.S. at 489, 494-495, 498 & n.6; *Cox* v. *Louisiana*, 379 U.S. 536, 551-552 (1965). That linkage cannot explain the confusion in the court of appeals' analysis, because the court held that "[t]he issue of a facial vagueness challenge" was not presented. Pet. App. 22a n.6. With that issue not in play, the court should have assessed whether the material-support statute is vague as applied to petitioners' proposed conduct, and then assessed whether the statute is overbroad on its face. In any event, the court did not find, nor could it have found,

that the vagueness it saw in the statute rendered the statute substantially overbroad. As petitioners' passing defense of the rationale of the decision below implicitly suggests, that rationale conflicts with this Court's precedents. Reversal is warranted for that reason.

B. The Statute's Terms Are Sufficiently Clear To Provide Notice To Persons Of Ordinary Intelligence

Implicitly conceding the weakness of the court of appeals' core rationale, petitioners ask for affirmance on a ground barely noted and still less defended in the decision below: that the material-support statute's terms do not provide sufficient notice to ordinary persons of what conduct violates the law. See Reply Br. 4-19. But that basis for the decision is no better than the one on which the court of appeals principally relied. The terms of the material-support statute, when given their ordinary meaning, clearly cover petitioners' proposed activities: there is nothing vague and nothing uncertain about how the statute applies to the assistance that petitioners wish to give terrorist organizations. As a result, even though petitioners raise only an as-applied challenge to the statute, they say almost nothing about their own proposed conduct. They instead level against the statute a number of facial attacks, which are irrelevant to their claim and, in any event, mistaken on the merits. Before turning to the clarity of the statute's terms as applied to petitioners' conduct, we address three errors that infect all of their analysis.

First, petitioners continue to seek a heightened standard of review, citing (Reply Br. 5) this Court's decisions in *Village of Hoffman Estates* and *Smith* v. *Goguen*, 415 U.S. 566 (1974). But neither those cases nor any other case has suggested that a generally appli-

cable, content-neutral statute regulating conduct is subject to a special, heightened vagueness standard whenever any of its applications potentially reaches expressive activity. *Goguen* involved a flag-desecration statute whose terms suggested a governmental interest in suppressing a particular message. *Id.* at 575-576; *Texas* v. *Johnson*, 491 U.S. 397, 411 (1989). And in *Village of Hoffman Estates*, the Court did not apply a heightened First Amendment standard of review; rather, it held that the ordinance at issue received at most the scrutiny appropriate for criminal laws regulating conduct, notwithstanding that the entity subject to the law alleged that the law incidentally restricted its expression. 455 U.S. at 496, 499-500.

Even assuming, however, that some heightened standard might otherwise apply, "the Court has recognized that a scienter requirement may mitigate" any need for greater legislative precision. *Village of Hoffman Estates*, 455 U.S. at 499. Petitioners argue (Reply Br. 6) that the material-support statute's express scienter requirement does not qualify under this well-settled law, because the defendant does not have to know that his aid qualifies as "material support or resources," 18 U.S.C. 2339A(b)(1); he only has to know that his aid is directed toward a "foreign terrorist organization," 18 U.S.C. 2339B(a)(1). But petitioners cite no precedent suggesting that scienter must go to each and every element of the offense. Here, Congress mitigated doubt about the scope of the statute by requiring scienter for a particularly important element, ensuring that the statute would extend only to persons who provide aid to groups that they know to be terrorist. That requirement provides substantial "notice to the complainant that his conduct is proscribed," *Village of Hoffman Estates*, 455 U.S. at

499, and thus forecloses any need for a heightened standard of review.

Second, petitioners suggest (Reply Br. 18) that their vagueness challenge is facial rather than as-applied. That suggestion, however, conflicts with the history of this litigation. The court of appeals held that petitioners had presented only an as-applied, and not a facial, vagueness challenge. Pet. App. 22a n.6. Petitioners agreed with that holding at the certiorari stage. See Br. in Opp. 17; Cross-Pet. 3 n.2 ("[R]espondents seek to enjoin these [challenged] provisions only with respect to their proposed speech activities."). In their opening brief to this Court, petitioners stressed that they challenge the vagueness of the statute only as applied to their particular conduct. See Pet. Br. 4, 25. Petitioners now attempt (Reply Br. 18) to cast their *vagueness* challenge as facial by pointing to their assertion of an *overbreadth* challenge. But petitioners' overbreadth challenge is necessarily facial; there is no such thing as an as-applied overbreadth challenge. That says nothing about the nature of their vagueness challenge, which they have repeatedly presented as as-applied. And even assuming that petitioners had presented a facial vagueness claim, it would fail for the same reasons as their overbreadth claim: the material-support statute is clear in the vast majority of its intended applications. See p. 26, *infra*; see also *Hill* v. *Colorado*, 530 U.S. 703, 733 (2000).

Third, petitioners attempt to dismiss (Reply Br. 6-7) their own use, to describe their own conduct, of the very words and phrases that they claim an ordinary person could not understand. They maintain that "[t]he fact that a term is used as a general descriptive matter in the English language" does not mean that it is "a permissi-

ble basis for criminalizing speech." *Id.* at 6. To the contrary, that is precisely what it means for vagueness purposes (putting aside any independent First Amendment argument). If the challenged terms were clear enough to petitioners "as a general descriptive matter in the English language," then a person of ordinary intelligence would understand the statute's use of those terms. See *Zicarelli* v. *New Jersey State Comm'n of Investigation*, 406 U.S. 472, 476-477 (1972) ("The term 'responsive' in ordinary English usage has a well-recognized meaning. It is not * * * 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'") (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)). Petitioners' own pleadings betray them; in choosing, to describe their proposed conduct, the selfsame language Congress chose to describe the prohibited conduct, petitioners acknowledge that the statute is not vague.

1. Instructing the PKK and LTTE on how to engage in international political advocacy constitutes "training"

a. Petitioners' response is most interesting for what it does *not* say with respect to the term "training." Petitioners barely discuss their own proposed activities; and when they do, they cast those activities in the broadest possible terms, such as "teaching people to advocate for peace and human rights" and "human rights instruction." Reply Br. 8-9. That is because, if petitioners were to say anything more concrete about their proposed activities, they would trip over the word "training" at every turn. The record reveals that such stumbling is what occurred below: petitioners understood their conduct as "training," and said so. Petitioners' complaint

thus repeatedly referred to their proposed activities as "training." See Gov't Br. 21. And at oral argument before the en banc court of appeals, their counsel twice referred to the "human rights advocacy training" that petitioners hope to provide. *Id.* at 26. Notably, petitioners are silent as to why an ordinary person would not share their own ready understanding of the term "training" as applied to their activities.

Nor should petitioners' newly generalized descriptions obscure the nature of their specific conduct. For example, petitioners alleged in their complaint that, in the past, "Judge Fertig and other HLP representatives have provided training to some members of the PKK and other Kurds on how to present their human rights claims before the U.N. and other public-policy making bodies, including the United States Congress." J.A. 58. And in the future, the complaint goes on to say, "[t]he HLP and Judge Fertig would like to * * * advis[e] Kurds and Kurdish groups on recent developments in international human rights law, the procedures for seeking review by the newly established International Criminal Court, peacemaking negotiation skills, and advocacy of the rights of Kurds before the Human Rights Subcommission of the United Nations and legislative bodies throughout the world, including the United States Congress." J.A. 59.

On any understanding of the difference between "general knowledge" and "specific skill[s]," 18 U.S.C. 2339A(b)(2), petitioners want to impart the latter. They want to instruct the PKK and LTTE on how to appear, lobby, or petition before bodies like Congress, the International Criminal Court, and the Human Rights Subcommission of the United Nations. That activity—methods of engaging national and international bodies

as to human rights claims—is not well known to members of the general public, and instruction in it requires education and experience that relatively few members of the public possess. Petitioners do not attempt to argue otherwise. See Reply Br. 7-9. The clarity of the term "training" as defined in the statute and as applied to petitioners' proposed conduct is fatal to their claim of vagueness.

b. In any event, petitioners' facial attacks on this term of the material-support statute fare no better. The term "training" ordinarily refers to instruction in a specialized skill, see Gov't Br. 19-20, and many federal statutes use the term in that manner, *id.* at 20 & n.2. Yet petitioners do not point to a single decision holding that "training"—or even any similar term—is vague. Petitioners respond (Reply Br. 9) that most of those other statutes neither define a criminal offense nor impose a penalty. Cf. 8 U.S.C. 1182(a)(3)(B)(iv)(VI) (denying admission to aliens who provide material support, including "training," to terrorists). But absent some evidence to the contrary, a term that is intelligible in other legal settings does not suddenly become unintelligible when employed in the criminal context. Although Congress attached criminal consequences to the provision of "training" to foreign terrorists, that term retains its customary and usual meaning in the material-support statute.

Even if the term "training" were not sufficiently clear standing alone, that would not assist petitioners, because as noted above, Congress elaborated the meaning of that term by reference to "specific skill[s]." After the court of appeals held in an earlier stage of this litigation that the term "training" was vague (notably, because it may "encompass[] First Amendment protected

activities"), *Humanitarian Law Project* v. *United States Dep't of Justice*, 352 F.3d 382, 404 (2003), Congress further defined that term in the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603(c), 118 Stat. 3762, to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. 2339A(b)(2). Congress thereby removed any possible ambiguity in the statute, by further defining "training" to mean only instruction in a specific skill. Cf. *Blakely* v. *Washington*, 542 U.S. 296, 326 (2004) (Kennedy, J., dissenting) ("Constant, constructive discourse between our courts and our legislatures is an integral and admirable part of the constitutional design."). This Court reviews Congress's enactments for reasonable precision, see *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972), and Congress clarified the statute to ensure beyond peradventure that it met this standard.

Petitioners incorrectly contend that "[e]very judge to have ruled on the 'training' prohibition in this case * * * has concluded that it is fatally unclear about what speech is prohibited." Reply Br. 7. In fact, what the courts below principally concluded—albeit under the mistaken label of "vagueness" analysis—is that the material-support statute reaches some protected expression. See Pet. App. 22a, 63a. Indeed, the court of appeals specifically held that the statute was impermissibly vague "[e]ven if persons of ordinary intelligence could discern between the instruction that imparts a 'specific skill,' as opposed to one that imparts 'general knowledge,'" because "the term 'training' could still be read to encompass speech." *Id.* at 22a. In other words, the court held that the term "training" is vague,

even if its statutory definition is *not* vague according to the well-established constitutional test.

Moreover, Congress's distinction between a specific skill and general knowledge is not itself vague. That distinction is common to the law. Several federal statutes distinguish between the general and the specific, see Gov't Br. 23, and the Sentencing Guidelines distinguish between generalized and specialized skills, see *id.* at 22 n.3. Petitioners do not say whether, on their view, each of those provisions would be subject to a potential vagueness challenge. They argue that similar statutes and the Sentencing Guidelines "do[] not separate criminal from non-criminal conduct." Reply Br. 9 n.2. But the response seems not to the point, which is that in all contexts (criminal and noncriminal alike) legislators and judges routinely depend on and apply a "general-specific distinction." *Id.* at 7. Its prevalence in the law, and the apparent ease with which it is applied, belies any contention that the distinction is "inescapably subjective." *Ibid.* After all, the vagueness inquiry turns not on how often Congress has used that distinction in defining criminal offenses, but on whether the distinction between imparting specific skills and imparting general knowledge is readily intelligible to the average person. The frequency of the distinction's appearance in the United States Code, as well as in ordinary language, answers that question.[1]

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[1] This Court has recognized that a statute is not vague merely because it might be characterized as involving a distinction of degree. Pet. Br. 27. In *Scales* v. *United States*, 367 U.S. 203 (1961), this Court interpreted the Smith Act, 18 U.S.C. 2385, to require active membership in certain organizations. It then rejected a vagueness challenge to the statute, holding that "[t]he distinction between 'active' and 'nominal' membership is well understood in common parlance, and the point at

Petitioners also incorrectly argue that this Court's decision in *Pierce* v. *Underwood*, 487 U.S. 552 (1988), "underscores the terms' ambiguity." Reply Br. 8. *Pierce* concerned a provision of the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(2)(A)(ii), authorizing increased attorney fees for "a special factor, such as the limited availability of qualified attorneys for the proceedings involved." In light of that language, the Court held that increased fees were available only for "attorneys having some distinctive knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation." *Pierce*, 487 U.S. at 572. Notably, the Court foresaw no difficulty in distinguishing between attorneys with specialized skills (like those who practice in the fields of intellectual property or foreign law, see *ibid.*) and attorneys with more general legal knowledge.

Petitioners contend that "[j]udicial determination of attorney compensation is a far cry from criminalizing speech." Reply Br. 8. Like the courts below, petitioners conflate their substantive challenges under the First Amendment with their vagueness challenge under the Fifth Amendment. *Pierce* demonstrates that the distinction between specialized skills and general knowledge is capable of clear application to a particular context; it is a separate question whether the statutory term defined by that distinction, as applied to petition-

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which one shades into the other is something that goes not to the sufficiency of the statute, but to the adequacy of the trial court's guidance to the jury by way of instructions in a particular case." *Scales*, 367 U.S. at 223 (internal citations omitted).

ers' conduct, runs afoul of the First Amendment.[2] The former goes to whether a statute is clear, while the latter goes to whether a clear statute is otherwise permissible. For purposes of vagueness doctrine, the critical point is that neither Congress, nor the Sentencing Commission, nor this Court, nor other courts have struggled to understand or apply the distinction between specific skills and general knowledge in any context. That distinction is no more difficult to understand or apply as it appears in the material-support statute.

For the proposition that the distinction between general knowledge and specific skills is "inescapably subjective," petitioners continue to rely (Reply Br. 7-8) solely on *Gentile* v. *State Bar*, 501 U.S. 1030 (1991). As the government previously explained, that decision is inapposite. See Gov't Br. 23-24. The state ethics rule at issue in *Gentile* prevented attorneys from "elaborat[ing]" on "the general nature of the claim or defense," 501 U.S. at 1048, and thereby demanded a subjective judgment about how much attorney speech is too much. Nothing of the kind is involved in the material-support statute. The term "training" requires an objective determination that the defendant's instruction was de-

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[2] Petitioners argue that under "the EAJA standard" their "proposed human rights instruction" involves general knowledge rather than specialized skill. Reply Br. 8-9. That is false: very few attorneys are capable of teaching others how to appear, lobby, or petition before governmental bodies on matters relating to international and human rights law. Indeed, the Court in *Pierce* specifically cited foreign law as the kind of subject matter requiring specialized knowledge. 487 U.S. at 572. In any event, applying the distinction between specialized skills and general knowledge depends in part on context. Unlike the EAJA, the material-support statute asks whether an ordinary citizen (not an attorney) is imparting to foreign terrorists (not legal clients) skills that are specialized vis-à-vis the general public (not the legal profession).

signed to impart a specific skill, not generally possessed by the public. Whether members of the public generally possess a skill "is a true-or-false determination, not a subjective judgment." *Williams*, 128 S. Ct. 1846. To be sure, "it may be difficult in some cases to determine" whether instruction is designed to impart such a skill, but "courts and juries every day pass upon" exactly that type of factual question. *Ibid.* (quoting *American Commc'ns Ass'n* v. *Douds*, 339 U.S. 382, 411 (1950)). And, unlike the rule in *Gentile*, the material-support statute contains a scienter requirement, which diminishes any residual danger that a person might inadvertently train foreign terrorists in specific skills. See 501 U.S. at 1049-1050.[3]

2. Consulting with the PKK and LTTE on international law, medical care, and economic development constitutes "expert advice or assistance"

a. Although their vagueness challenge is as-applied, petitioners likewise do not address how application of the term "expert advice or assistance" to their proposed conduct involves any doubt or uncertainty. In the past, "Judge Fertig, acting on behalf of the HLP, * * * has assisted members of the PKK and its political arm, the ERNK, in attempting to resolve peacefully the conflict between the Turkish government and the Kurds." J.A. 58. In the future, Judge Fertig and the HLP want to

[3] The ethics rule in *Gentile* also was a content-based regulation of speech—*i.e.*, "a ban on political speech critical of the government and its officials." 501 U.S. at 1034. Such a regulation "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno* v. *ACLU*, 521 U.S. 844, 871-872 (1997). By contrast, the material-support statute is a generally applicable, content-neutral regulation of conduct. See pp. 27-34, *infra*.

continue to "assist PKK members at peace conferences and other meetings designed to support a peaceful resolution of the Turkish conflict." J.A. 59; see Pet. Br. 10. Other petitioners want to aid the LTTE by providing "expert medical advice and assistance," J.A. 60; "expert advice on how to improve the delivery of health care, with a special focus on the area of otolaryngology," J.A. 61; and "expert advice and assistance" "in the fields of politics, law, and economic development," *ibid.*, as well as "information technology," J.A. 62.

It is unsurprising that all of the petitioners describe their proposed activities as "expert" in nature. International peace negotiators, medical doctors, development economists, and software programmers are commonly thought of as experts. Cf. *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 221-222 (1977) (noting that the negotiation of a collective-bargaining agreement may require the services of "expert negotiators"). Even without further explanation, the term "expert" is as ordinary and as readily understood as the vast majority of words found in federal (including criminal) statutes; and that term obviously applies to petitioners' conduct. But Congress removed any doubt about the meaning of that term by defining "expert advice or assistance" as "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. 2339A(b)(3). Petitioners do not attempt to argue with any particularity that the types of assistance they enumerate in their complaint do not "derive[] from scientific, technical or other specialized knowledge." Because that definition clearly covers petitioners' proposed activities, their as-applied vagueness challenge must fail.

b. In any event, petitioners cannot demonstrate that the phrase "scientific, technical or other specialized

knowledge" is unconstitutionally vague as applied to conduct generally. Petitioners do not directly respond to the government's argument that the terms "scientific" and "technical" have objective and readily understood meanings. Gov't Br. 31 ("[T]he use of terms like 'scientific' and 'technical' rests on factual determinations—*i.e.*, whether knowledge is specific, practical, and related to a particular branch of science or a profession.") (quoting *Webster's Third New International Dictionary of the English Language* 2348 (1993) (*Webster's*)). Nor do petitioners respond to the government's argument (Br. 30) that, under the principle of *ejusdem generis*, the term "specialized knowledge" takes it meaning from the preceding terms "scientific" and "technical." Under that commonly employed concept (even if uncommonly used label), an ordinary person would understand the entire phrase to mean knowledge relating to subject matter and based on experiences not commonly possessed or shared by the general public.

Because Congress drew the phrase "scientific, technical, or other specialized knowledge" from Federal Rule of Evidence 702, petitioners argue (Reply Br. 10) that the phrase's meaning is apparent only to judges, not ordinary citizens. But in interpreting Rule 702, this Court has looked to the ordinary meaning of the rule's words, see Gov't Br. 29-30, and petitioners do not contend otherwise. Moreover, even assuming (what is self-evidently not true) that the phrase "scientific, technical or other specialized knowledge" had a determinate meaning only in the legal context, that would not assist petitioners. In assessing the clarity of federal statutes, courts have long looked to whether Congress "employed words or phrases having a technical or other special meaning, * * * or a well-settled common-law meaning,

notwithstanding an element of degree in the definition as to which estimates might differ." *Connally*, 269 U.S. at 391; see *Williams*, 128 S. Ct. at 1846 ("[W]e have struck down statutes that tied criminal culpability to * * * wholly subjective judgments *without* statutory definitions, narrowing context, or *settled legal meanings*.") (emphasis added).

Petitioners no longer argue that all knowledge is derived from scientific, technical, or other specialized knowledge. See Pet. Br. 29-30. Rather, they now assert that the phrase "derived from" is itself "too indeterminate" to provide sufficient notice to an average person. Reply Br. 10. But there is no difficulty in applying that phrase to this case. Petitioners want to impart skills that they developed as a result of their substantial education and experience in law, medicine, and technology. See *Webster's* 608 (defining "derived" as "formed or developed out of something else"). The connection between petitioners' specialized knowledge and the expert assistance they seek to render is obvious and unattenuated. And petitioners offer no ground or evidence to think that the phrase "derived from" will be less clear as to some other set of persons involved in different activities. Suggestive of the opposite is the use of the identical phrase several hundred times in the United States Code. Petitioners say nothing about which of those other provisions are, on their view, also unconstitutional.

Petitioners contend (Reply Br. 10-11) that the distinction between types of general knowledge (like geography) and types of specialized knowledge (like geoscience or geopolitics) is "fundamentally indeterminate." *Id.* at 11. But a reasonable person contemplating assistance to foreign terrorists understands the differ-

ence between subjects that require substantial education or experience and subjects that do not. Indeed, petitioners' own example proves the point as well as any other. It does not require specialized knowledge to inform the LTTE's members of what presumably they and many others already know: Sri Lanka is an island nation located off the southern coast of India (geography). Yet it would require specialized knowledge to inform them of what they and others will not commonly know, such as, for instance, whether and where Sri Lanka contains large deposits of mineral ores (geoscience) or how European colonization has affected the country's current government (geopolitics). A person instructing members of the LTTE on how to develop natural resources or capitalize on nationalist trends is offering exactly the type of "expert advice or assistance" that Congress targeted in the material-support statute.[4]

3. Providing persons to work under the direction or control of the PKK and LTTE constitutes "personnel"

a. In their discussion of the term "personnel," petitioners again say nothing at all about their proposed activities. Among other things, petitioners seek to "engage in political advocacy on behalf of the PKK and the Kurds before the U.N. Commission on Human Rights and the United States Congress; * * * and * * * as-

[4] Petitioners claim that the types of aid prohibited by the material-support statute—such as "false documentation or identification, communications equipment, * * * weapons, lethal substances, [and] explosives," 18 U.S.C. 2339A(b)(1)—suggest that the statute "forbids only advice that furthers a group's violent ends." Reply Br. 11. But the statute also prohibits the provision of many other types of aid—including "currency or monetary instruments or financial securities, financial services, lodging," "facilities," and "transportation," 18 U.S.C. 2339A(b)(1)—which need not be used to further a group's violent ends.

sist PKK members at peace conferences and other meetings." J.A. 58-59. As amended by Congress in IRTPA, the term "personnel" requires that a defendant knowingly provide one or more persons "to work under" a foreign terrorist organization's "direction or control" or "to organize, manage, supervise, or otherwise direct the operation of that organization." 18 U.S.C. 2339B(h). By contrast, the statute exempts any individual "who act[s] entirely independently of the foreign terrorist organization to advance its goals or objectives." *Ibid.* Petitioners do not attempt to argue that their intended conduct, coordinated as it is with the PKK and LTTE, does not fall within the statutory definition of "personnel."

b. Petitioners' "principal vagueness objection" is that between action taken under a foreign terrorist organization's direction or control and action taken independently of that organization, there is a "vast gray area" that creates uncertainty "as to what is permissible." Reply Br. 15. That claim—*i.e.*, that the scope of the statute is so unclear that persons who want to assist known foreign terrorists cannot know what forms of aid generally are prohibited—is the essence of a facial, not as-applied, vagueness challenge. See *Williams*, 128 S. Ct. at 1845; *Village of Hoffman Estates*, 455 U.S. at 494-495, 497-498.

In any event, the question whether a defendant has acted "under [a] terrorist organization's direction or control" is simply a factual issue to be resolved by the jury in a particular case. 18 U.S.C. 2339B(h). That question may be close in some circumstances, but the possibility of hard cases does not render the term "personnel" vague. As this Court reasoned in *Williams*, "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether

the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." 128 S. Ct. at 1846. Nothing about the facts to be established under the "personnel" provision is indeterminate.

Contrary to petitioner's claim (Reply Br. 15-17), the government has not argued that the material-support statute somehow incorporates antitrust doctrine. Section 2339B(h) requires a particular type of concerted action: "work under [a] terrorist organization's direction or control." The government has never contended that this statutory requirement mirrors the Sherman Act, and petitioners' extended discussion of this comparison is therefore beside the point. What the government has argued, and what goes unrebutted by petitioners, is that a number of federal statutes rely in some manner on the distinction between action taken independently and action taken in concert with another. Accordingly, "[j]ust as, for instance, an ordinary person understands the difference between 'concerted effort by more than one entity to fix prices or otherwise restrain trade' and 'independent activity by a single entity,' *Fisher* v. *City of Berkeley*, 475 U.S. 260, 266 (1986), so too he will understand the difference between acting under a foreign terrorist organization's 'direction or control' and acting on his own." Gov't Br. 35.

Indeed, quite apart from antitrust law, the definition of "personnel" is similar to terms used in other federal statutes that impose criminal liability on persons who either act under another's direction or control, see, *e.g.*, 18 U.S.C. 175b(d)(2)(G); 18 U.S.C. 951(d), or manage, supervise, or organize an operation or individual, see, *e.g.*, 18 U.S.C. 225(a)(1); 18 U.S.C. 1169(b)(1); 18 U.S.C. 1960(a). Petitioners argue that "[n]one of the cited statutes threatens to criminalize otherwise-protected First

Amendment activity based solely on varying levels of coordination with a designated group." Reply Br. 17. But again, petitioners conflate their First and Fifth Amendment challenges. The question for vagueness purposes is not whether the First Amendment permits the criminalization of conduct (or, as petitioners would have it, expressive activity) that occurs in coordination with known foreign terrorists. Rather, the relevant question is whether the concept of coordination is too indeterminate to provide the basis for criminal liability. As numerous federal statutes demonstrate, the answer is no.

Two of these federal criminal statutes impose liability on persons who act under "the direction or control" of another. See 18 U.S.C. 175b(d)(2)(G) (prohibiting the possession, shipment, or transportation of certain biological agents by "an individual who * * * operates subject to the direction or control of" a foreign government designated by the Secretary of State as supporting terrorism); 18 U.S.C. 951(d) (requiring notification to the Attorney General by certain "individual[s] who agree[] to operate within the United States subject to the direction or control of a foreign government or official"). Petitioners attempt in vain to distinguish those statutes.

With respect to Section 175, petitioners contend that "[t]he underlying prohibition on possessing biological agents has no nexus to protected speech, and thus need not satisfy heightened vagueness standards." Reply Br. 17 n.7. But Section 2339B(a)(1) also lacks any nexus to speech, prohibiting as it does the provision of material support and resources, including personnel, to known foreign terrorists. In any event, both Section 175 and the personnel provision here require, in order to estab-

lish the prohibited underlying conduct, a factual determination about whether an individual operates subject to "the direction or control" of a foreign entity. Petitioners never explain why raising the standard of review for the personnel provision would suddenly render that factual determination impossible.

With respect to Section 951, petitioners assert that it "invokes a traditional agency relationship." Reply Br. 18 n.7. But in specifically defining the phrase "agent of a foreign government," Section 951 chooses not merely to incorporate or rely on traditional agency principles. See Restatement (Second) of Agency § 1 (1958). Instead, it defines an "agent" as an "individual who agrees to operate within the United States subject to the direction or control of a foreign government or official." 18 U.S.C. 951(d). Once again, petitioners offer no explanation for why the same statutory phrase—"direction or control"—is clear in the context of Section 951(d) but indeterminate in the context of Section 2339B(h).

Finally, petitioners do not dispute that both before and after IRTPA's enactment, courts have consistently upheld the term "personnel" against vagueness challenges. See Gov't Br. 35-36. Petitioners claim that those cases did not involve "the type of loosely coordinated speech" in which they seek to engage. Reply Br. 18 n.7. But it is hard to see from the face of petitioners' complaint where this "looseness" resides; the activities mentioned there disclose direct and substantial connections to terrorist organizations. See J.A. 58-59. And as discussed above, petitioners have provided no further detail about their intended conduct before this Court. If petitioners' conduct will not occur under the "direction or control" of the PKK and LTTE, they have no reason to seek an injunction against enforcement of the term "per-

sonnel"; and if their conduct will occur under the "direction or control" of the PKK and LTTE, they have no basis for such an injunction.

4. Helping the PKK and LTTE appear before national and international representative bodies constitutes "services"

a. Petitioners do not attempt to explain why the term "service" is unclear as applied to their proposed conduct. No doubt that is because, although their hypotheticals suggest otherwise (Reply Br. 14), petitioners seek to render direct benefit to the PKK and LTTE by assisting in the actions that those groups undertake. Petitioners seek to "assist[] the PKK in appearing before national and international representative bodies such as the United Nations Human Rights Subcommission, the Council of Europe, the United States Congress, and international human rights conferences." J.A. 98. In particular, they seek "to provide training and expert advice and assistance * * * on how to bring claims and appeals of Kurds before the UN and other policy making bodies." J.A. 99. Petitioners' proposed conduct therefore falls squarely within the term "service" on any interpretation.

b. Petitioners contend that, as evidence of the term's ambiguity, "the government offers three dramatically different definitions" of "service." Reply Br. 12. That is not the case. See Gov't Br. 38-41. The government's principal position is that the term "service" refers to "an act done for the benefit or at the command of another." *Webster's* 2075; see Gov't Br. 38. Under this definition, the terrorist organization's command or behest is not a necessary element; petitioners themselves suggest that Congress intended to prohibit services "such as survey-

ing and mapping a target site" that are provided to foreign terrorist organizations, even if not at their behest or command. Reply Br. 13. In light of the statute's purposes, Congress surely employed the term "service," consistent with its ordinary meaning, to refer to an act done for the benefit of a foreign terrorist organization. That definition fits well with the statute's additional requirement that the "service" be provided "*to* a foreign terrorist organization." 18 U.S.C. 2339B(a)(1) (emphasis added). Because of that requirement, it is not sufficient for a defendant, acting independently of a foreign terrorist organization, to perform an act that may in fact benefit that organization. Rather, the defendant must channel the intended benefit toward that organization.[5]

Petitioners incorrectly assert that the phrase "service to" is not limited to aid directed toward a foreign terrorist group, because "[i]ndependently acting to benefit someone is not uncommonly labeled rendering a service to him." Reply Br. 14. In fact, it would be unusual to say that someone who, on his own, performs an act that indirectly benefits the PKK and LTTE has rendered a type of "material support or resources"—*i.e.*, a "service"—"to" those groups. And petitioners' reading becomes all the more implausible when the word "service" is viewed in context. Section 2339A(b)(1) forbids providing a number of types of support to foreign terrorist organizations, from "currency" and "financial ser-

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[5] Contrary to petitioners' argument (Reply Br. 14 n.4), the question is not whether the defendant renders aid to a terrorist organization directly or through an intermediary, but whether the defendant targets the organization as the ultimate recipient of its intended aid. See Gov't Br. 22, 39; see also Gov't C.A. Reply Br. 8 n.1 ("[T]he statute would prohibit, for example, giving money to a terrorist group through a third-party conduit.").

vices" to "weapons" and "explosives." As the types of aid enumerated in the statute indicate, Congress was concerned with "service[s]" that are directed toward a foreign terrorist organization. See Gov't. Br. 39-40. Moreover, reading "service" to include independent advocacy, as petitioners suggest, would make meaningless Congress's decision to exclude such activity from the subsidiary term "personnel." "[T]he various provisions of the Act should be read *in pari materia*," *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138 n.11 (1985), with "service" interpreted not to encompass types of conduct—like independent advocacy—that its subsidiary terms specifically exclude. See Gov't Br. 40.[6]

Indeed, the government has taken the position throughout this litigation that independent advocacy is not covered by the term "service." See, *e.g.*, Gov't C.A. Br. 46. That consistent position is entitled to respect in evaluating whether the term "service" is unconstitutionally vague. See *Grayned*, 408 U.S. at 110 (vagueness challenge to a statute requires consideration "to some degree" of "the interpretation of the statute given by those charged with enforcing it"); cf. *Village of Hoffman Estates*, 455 U.S. at 494 n.5 ("In evaluating a facial chal-

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[6] Contrary to petitioners' assertion (Reply Br. 13), this argument is not new. In their opening brief before the court of appeals, petitioners argued that the term "service" "is so broad that it swallows any of the limitations" contained in the other challenged terms. Pet. C.A. Br. 49-50. The government responded that "'service'—like the terms 'training' and 'expert advice or assistance'—is limited by surrounding statutory terms and context to mean support knowingly given directly to terrorist groups, and does not include independent advocacy that might indirectly benefit such organizations." Gov't C.A. Br 46. Thus, petitioners have long been on notice that the government interprets the statutory phrase "service to" as excluding independent advocacy.

lenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proferred.") (citing *Grayned*, 408 U.S. at 110).

If, however, this Court finds that the government's preferred reading of "service" (as including "acts done for the benefit of another") could sweep in independent advocacy, even when combined with the word "to," then the Court should limit the term "service" to acts done at the command or behest of a foreign terrorist organization to further its goals and objectives. See Gov't Br. 40-41. Interpreted in that way, the statute could not possibly reach independent advocacy, and thus it would not, even on petitioners' approach, present a vagueness problem. "[W]hen 'a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter.'" *Harris* v. *United States*, 536 U.S. 545, 555 (2002) (quoting *United States ex rel. the Att'y Gen. of the United States* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). To the extent that the government's principal reading of "service to" raises concern, this canon of constitutional doubt permits interpretation of the statute to require that a "service" be done at a foreign terrorist organization's command or behest.

Under either approach, whether the defendant has the requisite connection with a known terrorist organization is a straightforward factual question. The government may find it harder or easier to prove that connection in a given case, but nothing about the question itself is subjective or indeterminate. See *Williams*, 128 S. Ct. at 1846. Although petitioners strain to read the term "service" (Reply Br. 14), and indeed all of the chal-

lenged terms (*id.* at 18-19), in a manner that would render the statute unconstitutional, the duty that this Court owes to a coordinate Branch compels a different course. See, *e.g.*, *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 129 S. Ct. 2504, 2513 (2009). Reasonably interpreted, the contested terms in the material-support statute all have a clear meaning to an ordinary person, and accordingly the statute is not unconstitutionally vague.

II. THE MATERIAL-SUPPORT STATUTE'S RESTRICTIONS ON PROVIDING AID TO KNOWN TERRORIST ORGANIZATIONS DO NOT VIOLATE THE FIRST AMENDMENT

Petitioners largely abandon (Reply Br. 18-19) their claim that the material-support statute is overbroad. They assert in passing that the four challenged terms "are so profoundly indeterminate that they are facially overbroad," *id.* at 18, but they make no effort to demonstrate that the statute prohibits a "substantial" amount of protected expression, judged both in absolute terms and in relation to the statute's legitimate applications, *Virginia* v. *Hicks*, 539 U.S. 113, 119-120 (2003). Although petitioners say (Reply Br. 18-19) that the statute interferes with the work of some of their amici, those amici do not themselves contend that the statute is overbroad. See Carter Center Amicus Br. 6, 28. In the end, petitioners offer no serious challenge (nor could they) to the court of appeals' conclusion that Section 2339B is not overbroad.

Petitioners continue to argue (Reply Br. 20-39) that Section 2339B, as applied to their proposed conduct, violates their speech and association rights. Not a single court (and indeed not a single judge on the en banc court of appeals in this case) has accepted either of those arguments. The material-support statute is a content-neu-

tral regulation of conduct that at most incidentally restricts petitioners' speech and association. It is therefore subject to no more than intermediate scrutiny on both claims under *United States* v. *O'Brien*, 391 U.S. 367 (1968). And, as the court of appeals held, it survives such scrutiny because it is narrowly tailored to advance important governmental interests unrelated to the suppression of expression or association.

A. The Statute Is A Regulation Of Conduct That Only Incidentally And Permissibly Affects Expression

1. As a facially neutral regulation of conduct, Section 2339B may impose an incidental burden on speech

a. Petitioners' challenge is defeated by two key points. See Gov't Br. 44-47. First, Section 2339B is a regulation of a type of conduct—providing aid to foreign terrorist organizations. *Id.* at 45. That prohibition on conduct applies without regard to whether the donor of the aid intends to convey a particular message or engage in expression at all. Accordingly, to the extent that Section 2339B restricts expressive activity, that restriction is incidental to a generally applicable and content-neutral ban on conduct. Second, Section 2339B's ban on providing aid to foreign terrorist groups is justified by a governmental interest that is unrelated to the suppression of expression. The statute is directly geared to preventing the flow of material aid to groups whose violent activities threaten American lives and interests. *Id.* at 45-47.

b. Under this Court's precedents, generally applicable regulations of conduct that impose an incidental burden on expression are subject to intermediate scrutiny under *O'Brien*. See, *e.g.*, *United States* v. *Albertini*, 472 U.S. 675, 687 (1985) ("Application of a facially neutral

regulation that incidentally burdens speech satisfies the First Amendment" if it survives intermediate scrutiny.); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 604 (2001) (Stevens, J., concurring in part) ("This Court has long recognized the need to differentiate between legislation that targets expression and legislation that targets conduct for legitimate non-speech-related reasons but imposes an incidental burden on expression."); *id.* at 567.

Petitioners appear to argue (Reply Br. 20-26) that the *O'Brien* test applies only when a facially neutral regulation of conduct imposes an incidental burden on acts, divorced from all words, that express a message. That argument makes clear that it is petitioners, not the government, who hope to "radically revise[]" "First Amendment doctrine." *Id.* at 26. This Court has never limited *O'Brien*'s test for incidental restraints in such a manner. To the contrary, this Court has held that intermediate scrutiny applies to content-neutral regulations of conduct that impose incidental burdens on communication, regardless whether that communication is written, oral, or (as in *O'Brien* itself) symbolic. See *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 189 (1997) (*Turner II*); *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 662 (1994) (*Turner I*); *Wayte* v. *United States*, 470 U.S. 598, 611 (1985); *City Council of L.A.* v. *Taxpayers for Vincent*, 466 U.S. 789, 804-805 (1984); see also *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct."). So far as the government is aware, no member of this Court, nor any lower court, has suggested that strict scrutiny should replace the *O'Brien* test when a generally applicable, content-neutral regulation of conduct incidentally restrains expression involving words.

Nor do petitioners explain why the Court should limit the *O'Brien* test to cases in which the incidental restriction burdens a single form of expression—*i.e.*, nonverbal expression. The conduct at issue in *O'Brien* was indisputably communicative in nature and purpose, and this Court did not suggest that it had some lesser value because it relied on symbols. See *Reilly*, 533 U.S. at 567 (noting *O'Brien*'s application to incidental restrictions of "communicative action"); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 386 (2000) (same). What matters under *O'Brien* and its progeny is not the form of a person's communication, but whether the government has regulated that communication only incidentally, as part of a general regulation that applies irrespective of the person's message.[7]

Section 2339B is just such a generally applicable regulation. What the statute prohibits is the act of providing aid to known foreign terrorist organizations in a wide variety of forms, tangible and intangible, economic and noneconomic. The statute applies regardless of a person's beliefs or motives in rendering material support to a terrorist organization. The statute applies regardless whether the support is accompanied by any expression (verbal or nonverbal) and, if it is, regardless of the content of that expression. See Pet. App. 28a. No

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[7] In an analogous context, this Court has applied the constitutional standard for time, place, and manner regulations—which "is little, if any, different" from the *O'Brien* standard for content-neutral regulations of conduct, *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984)—to instances of both expressive conduct, *ibid.*, and speech, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). Whether applied to expressive conduct or speech, this Court has upheld a time, place, or manner regulation if it is "justified without reference to the content of the regulated speech." *Ibid.* (quoting *Clark*, 468 U.S. at 293).

doubt the statute sometimes will sweep in expression, including words. When, for example, a person trains a terrorist organization in building bombs or flying airplanes or (as here) petitioning international bodies, words are likely to be involved. But the statute does not specially regulate expression, let alone expression of any particular kind; nor does its application depend on any particular communicative effect. Cf. *Johnson*, 491 U.S. at 411-412. Section 2339B prohibits the provision of material support to known foreign terrorists generally, and therefore is subject to intermediate scrutiny under *O'Brien*.

c. For similar reasons, petitioners cannot claim that in enacting the material-support statute, Congress's interest was "related to the suppression of free expression." *Johnson*, 491 U.S. at 403. Congress's manifest interest was to end the flow of support and resources to foreign organizations engaged in violent and unlawful activities. Congress acted on the view that all support to such organizations, even if ostensibly directed at their legal activities, abetted their terrorist aims. Cf. *Boim* v. *Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (en banc) ("Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities."), cert. denied, 130 S. Ct. 458 (2009). "[T]he fungibility of financial resources and other types of material support" would permit individuals "to supply funds, goods, or services to an organization," which would "help[] defray the cost to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities." H.R. Rep. No. 383, 104th Cong., 1st Sess. 81 (1995) (*1995 House Re-*

port). Nothing about that governmental interest relates in any way to the suppression of free expression.

Petitioners appear to argue (Reply Br. 22-23) that because they wish to engage in "pure speech," the government's interest in applying the material-support statute to them must relate to suppressing expression. That proposition is wrong because its premise is wrong. More is at issue here than "only words," with "no nonspeech element or noncommunicative conduct." *Id.* at 22 (internal quotation marks omitted). To the contrary, what petitioners wish to do in this case has an obvious nonspeech element: they hope to provide material support to terrorists. And application of the statute to petitioners follows exclusively from their proposed provision of such support, in the form of training, expert assistance, and personnel.

This Court has recognized often that words can have nonspeech elements or be ancillary to conduct (just as acts can have speech elements or be ancillary to expression). For example, the Court in *R.A.V.* noted that spoken words may have "unprotected features" deriving from the "'nonspeech' element of communication." 505 U.S. at 386. That is why the government has the "power to proscribe particular speech on the basis of a noncontent element (*e.g.*, noise)," although that "does not entail the power to proscribe the same speech on the basis of a content element." *Ibid.* Similarly, the Court has acknowledged that language can be but a vehicle for or adjunct to proscribable conduct. In *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (*FAIR*), this Court held that because "[t]he compelled speech" involved in that case was "plainly incidental to the Solomon Amendment's regulation of conduct," it did not violate the First Amendment: "it

has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 62 (quoting *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).[8]

That is all that is at issue here. The application of Section 2339B to petitioners reflects the government's interest not in suppressing the expression of petitioners' ideas, but in preventing material support to foreign terrorist organizations. Petitioners propose to provide tangible assistance to terrorists through the medium of language, but that does not exempt them from the force of the statute. That is because the government is targeting the nonspeech (and *a fortiori* the noncontent) element of petitioners' proposed dealings with the PKK and LTTE.[9] Nor does it matter, as petitioners seem to think, that they wish through their training and other activities to support purportedly legitimate operations of terrorist organizations. Congress determined that by imparting to the PKK and LTTE valuable skills, peti-

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[8] In *FAIR*, this Court noted that "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." 547 U.S. at 62. Similarly, the Court has long recognized that statutes prohibiting such conduct as blackmail, bribery, fraud, and treason—even though all those acts are effectuated through the use of language—raise no serious First Amendment concern.

[9] It is for this reason that cases like *Cohen* v. *California*, 403 U.S. 15 (1971), are utterly inapposite. See Reply Br. 26 & n.12. In those cases, unlike in this one, the government's application of a statute arose from and targeted the content of a speaker's message or the likely communicative impact of that message on its intended audience.

tioners free resources, either directly or indirectly, for terrorist organizations to devote to unlawful activities. Petitioners' actions thus strengthen those groups and, in turn, endanger American lives and interests. *1995 House Report* 81. Application of Section 2339B to petitioners arises only from these legitimate governmental interests; it prevents petitioners, no matter what ideas they have or express, from providing direct support to and thereby strengthening terrorist organizations.

2. Section 2339B is not a content-based restriction on speech

a. Petitioners argue (Reply Br. 29-30) that the material-support statute's prohibitions on "training" and "expert advice or assistance" (but apparently not "personnel" and "service") are content-based. Petitioners agree (*id.* at 28), as they must, that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *City of L.A.* v. *Alameda Books, Inc.*, 535 U.S. 425, 448 (2002). That rule resolves the question. The categories of "training" or "expert advice or assistance" do not necessarily refer to speech at all; nor do the provisions distinguishing between general knowledge and specific skills, on which petitioners seem to place greatest weight. Such prohibitions on conduct do not become content-based regulations of speech because they incidentally restrict some but not all expressive activity.[10] And even as and when

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[10] Petitioners appear to agree (Reply Br. 29-30) that a law is not content-based simply because one must "look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Hill* v. *Colorado*, 530 U.S. 703, 721 (2000). Although *Hill* concerned time, place, and manner regulations, that fact

applied to expressive activity, the statutory terms do not distinguish based on viewpoint or subject matter or speaker or any other consideration that this Court has viewed as suspect in its First Amendment case law. The training and expert assistance prongs of Section 2339B prohibit aid to terrorist organizations—not speech and certainly not speech with any particular message.

b. Petitioners further argue (Reply Br. 28) that the statute is content-based because it does not prohibit the provision of medicine and religious materials. See 18 U.S.C. 2339A(b)(1). But that limitation again has nothing to do with the content of any speaker's message. Congress was entitled to find that certain forms of assistance are not fungible, and so will not inevitably aid the activities of terrorist organizations that endanger American lives and interests. Or Congress was entitled to determine that the humanitarian value of some forms of aid outweighs the interests supporting their prohibition. If Congress may ban the flow of material support or resources generally, then it may narrow that ban by creating exceptions, so long as the governmental interest in those exceptions—like the governmental interest in the ban itself—is unrelated to the suppression of expression. The justification for preventing resources from flowing to terrorists becomes no less significant because Congress has determined that some resources present lesser dangers. See *Albertini*, 472 U.S. at 687 ("That justification [for excluding the defendant] did not

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is irrelevant. A host of generally applicable laws regulating conduct work in the same way, such as statutes regulating discrimination or misbranding of products. Determining whether a defendant has violated the law depends on knowing what he has said, but that does not render such laws content-based.

become less weighty when other persons were allowed to enter.").

3. *Section 2339B is narrowly tailored to advance the important governmental interest in preventing aid to terrorists*

a. Petitioners contend (Reply Br. 31-32) that the government must justify the material-support statute as applied to their specific conduct. But that requirement does not apply to statutes subject only to intermediate review. As this Court explained in *Albertini*, "[t]he First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests." 472 U.S. at 688. According to the Court, "[r]egulations that burden speech incidentally * * * must be evaluated in terms of their general effect." *Id.* at 688-689 (internal citation omitted); see *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296-297 (1984) ("[T]he validity of this regulation need not be judged solely by reference to the demonstration at hand."). Here, the government must prove that it has a substantial interest in the material-support statute taken as a whole, not taken in each particular application. And petitioners concede that, as a general matter, the government has "legitimate interests" in Section 2339B. Reply Br. 32.

b. In any event, petitioners' argument (Reply Br. 33-35) that the government lacks a sufficiently important interest to regulate their activity does not defeat Congress's considered judgment. Congress found that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribu-

tion to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1247. Petitioners claim that Congress had in mind only "'contributions,' not speech," Reply Br. 33, but in fact Congress deliberately extended the prohibition beyond monetary donations. The accompanying House Report makes clear that, without Section 2339B, "the fungibility of financial resources *and other types of material support*" would permit individuals "to supply funds, *goods, or services* to an organization." *1995 House Report* 81 (emphasis added). Congress thus was concerned about the delivery of a broad array of material support, including the services that petitioners wish to provide. That Congress did not mention speech is only further evidence that Section 2339B is content-neutral: Congress cared generally about individuals rendering service to foreign terrorist organizations, regardless whether that service involved any expression.

c. Petitioners similarly assert that "[h]uman rights advocacy training and peacemaking are not fungible like money." Reply Br. 34. That assertion in fact underlies petitioners' entire case, but it is addressed to the wrong branch of government. Petitioners dispute (*id.* at 42-44) the idea that assisting terrorist organizations in the way they propose will endanger American lives and interests. But Congress has made a different judgment about the need to prevent aid to foreign terrorist organizations generally, and that judgment is entitled to respect. See, *e.g.*, *Turner II*, 520 U.S. at 195 ("In reviewing the constitutionality of a statute, 'courts must accord substantial deference to the predictive judgments of Congress.'") (quoting *Turner I*, 512 U.S. at 665); *United States* v. *Eichman*, 496 U.S. 310, 314 (1990) (noting "the

deferential standard" of review that applies to "regulations of conduct containing both speech and nonspeech elements where 'the governmental interest is unrelated to the suppression of free expression'") (quoting *O'Brien*, 391 U.S. at 377).

That is especially so in this context because Section 2339B implicates sensitive national security and foreign affairs interests, to which a heightened degree of deference to Congress and the Executive Branch is warranted. See *Humanitarian Law Project* v. *Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000) ("Because the judgment of how best to achieve that end [of combating terrorism] is strongly bound up with foreign policy considerations, we must allow the political branches wide latitude in selecting the means to bring about the desired goal."), cert. denied, 532 U.S. 904 (2001); see also *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *Regan* v. *Wald*, 468 U.S. 222, 242 (1984).

Even taken on its own terms, petitioners' view on this score is at odds with itself. Petitioners broadly claim (Reply Br. 42-44) that training terrorist organizations in peacemaking and human rights advocacy will not undermine national security. But they conceded before the lower courts that Congress could constitutionally prohibit any and all forms of support to al Qaeda—presumably because such aid does pose a security danger. See Pet. C.A. Br. 32 n.13. Petitioners' position thus amounts to a claim that Congress may not extend the material support statute to additional terrorist organizations, including the PKK and LTTE. The basis for that claim, as the government noted in its opening brief (at 57), has nothing to do with the statute's sup-

posed vagueness, content-discrimination, or associational effects. Rather, it is grounded in petitioners' policy judgment about aid to al Qaeda as compared with aid to other terrorist organizations. Petitioners' silence in response speaks volumes about the real basis of this lawsuit.

B. The Statute Does Not Infringe Petitioners' Right Of Association

1. Petitioners contend (Reply Br. 36-39) that the material-support statute violates their right to associate with foreign terrorist organizations. But just as Section 2339B regulates conduct—the act of giving material support—regardless of its expressive content, so too it regulates such conduct regardless of simple membership in or association with foreign terrorist groups. It is therefore again subject to intermediate scrutiny under *O'Brien*. And it survives that scrutiny for essentially the same reason: it is narrowly tailored to advance important governmental interests unrelated to the suppression of association. See Gov't Br. 59-61. Petitioners' only answer to these points is to misstate the extent of what Section 2339B prohibits.

Petitioners assert that by "effectively outlawing all 'concerted activity,'" Section 2339 "penalize[s] virtually *anything* one might do in association with a designated group." Reply Br. 36. That assertion ignores the point, made by both the court of appeals and the government, that "[t]he statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group." *Humanitarian Law Project*, 205 F.3d at 1133; see Gov't Br. 15. Rather, what the statute "prohibits is the act of giving material support, and there is no constitutional right

to facilitate terrorism." *Humanitarian Law Project*, 205 F.3d at 1133. Petitioners are therefore incorrect that Section 2339 penalizes "association plus something more." Reply Br. 38. What the statute penalizes is only the "something more"—*i.e.*, not mere membership or association, but only the act of rendering material support, in the form of property or services, to foreign terrorists.

2. Petitioners are also incorrect that "the government simply redefines 'peaceably assembling with members of the PKK and LTTE for lawful discussion' of human rights advocacy and peacemaking as a 'service.'" Reply Br. 37. The government made clear in its opening brief that "Section 2339B * * * does not prevent petitioners from peaceably assembling with members of the PKK and LTTE for lawful discussion." Br. 61. Petitioners may join the PKK and LTTE, gather with those groups' members, and discuss subjects of mutual interest. Petitioners filed the present suit for injunctive relief, however, because they want to do more than engage in discussion with terrorist groups. Specifically, petitioners want to train the PKK and LTTE on how to appear before international bodies; assist those groups at international meetings and conferences; and offer medical care, economic development services and information technology to those groups and their members. J.A. 58-63.

That fact distinguishes the present case from *De Jonge* v. *Oregon*, 299 U.S. 353 (1937). The defendant in *De Jonge* was not charged with the kind of acts that petitioners wish to perform. Rather, "[h]is sole offense as charged, and for which he was convicted and sentenced to imprisonment for seven years, was that he had assisted in the conduct of a public meeting, albeit other-

wise lawful, which was held under the auspices of the Communist Party." *Ibid.* This Court set aside the defendant's conviction, holding that he could not be punished solely for exercising his First Amendment right to engage in "peaceable assembly for lawful discussion." *Id.* at 365. Section 2339B accords with that principle: it does not prohibit petitioners from peaceably assembling with foreign terrorist organizations for lawful discussion. Nothing in *De Jonge* suggests that Congress may not prohibit petitioners from the additional act, separate from peaceable discussion, of providing material support to groups with a demonstrated willingness to engage in terrorism.

3. Finally, petitioners ignore the effect of the international context on their claims. Although this Court has not confronted the issue in the context of associational rights, this Court and other courts have recognized the "longstanding right of the sovereign to protect itself." *United States* v. *Ramsey*, 431 U.S. 606, 616 (1977). As a corollary to that right, this Court and other courts have consistently recognized the authority of the political Branches to restrict individuals from dealing with foreign governments whose actions are deemed to be inimical to American interests. See, *e.g.*, *Wald*, 468 U.S. at 242-243 (rejecting Fifth Amendment challenge to President's decision to curtail travel to Cuba); *Zemel* v. *Rusk*, 381 U.S. 1, 16-17 (1965) (holding that a United States citizen lacked any First Amendment right to travel to Cuba to gather information); *Veterans & Reservists for Peace in Vietnam* v. *Regional Comm'r of Customs*, 459 F.2d 676, 681-684 (3d Cir.) (upholding Trading with the Enemy Act and Foreign Assets Control Regulations against First Amendment claim to re-

ceive foreign literature), cert. denied, 409 U.S. 933 (1972).

The principle is as relevant to foreign terrorist organizations as to foreign governments: the foreign affairs powers of the political Branches include substantial authority, of just the kind Congress exercised in enacting the material-support statute, to restrict individuals from providing aid to foreign entities that threaten harm to this Nation's interests. See *Zemel*, 381 U.S. at 16 ("[T]he restriction which is challenged in this case is supported by the weightiest considerations of national security."); *Regan*, 468 U.S. at 242 ("Our holding in *Zemel* was merely an example of this classical deference to the political branches in matters of foreign policy."); *ibid.* (upholding Cuban travel ban as "justified by weighty concerns of foreign policy"). Individuals are subject to limitations in their relations with foreign governments and entities that differ from any found in the domestic setting. See *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). So even assuming that petitioners have some right of association to provide material support to domestic terrorist organizations, no such right should exist in the international context. And because the speech rights that petitioners have asserted in this case largely collapse into their claim of associational rights (given that the material support statute does not limit their independent advocacy), petitioners' speech claims fail for the same reason.

III. THE MATERIAL-SUPPORT STATUTE'S RESTRICTIONS ON PROVIDING AID DO NOT REQUIRE SPECIFIC INTENT TO FURTHER THE TERRORIST ORGANIZATION'S UNLAWFUL ACTIVITIES

1. Before the lower courts, petitioners claimed that the material-support statute violates the Fifth Amendment's Due Process Clause unless it is interpreted to require specific intent to further a terrorist organization's unlawful activities. Before this Court, petitioners relegate that claim to a pair of footnotes (Br. 43 n.23; Reply Br. 36 n.17) that seek to incorporate by reference their arguments before the court of appeals. That strategy "is not enough to raise the question fairly" for this Court's consideration. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 735 n.24 (2004).

Before this Court, petitioners press a different argument: that interpreting the material-support statute to require proof of specific intent would avoid resolution of all their constitutional claims. Contrary to their contention (Reply Br. 39 n.19), petitioners did not raise that argument below. The "constitutional infirmity" that they previously urged the court of appeals to avoid was imposing guilt by association in violation of the Fifth Amendment. Pet. C.A. Reply Br. 11-19; see Pet. C.A. Br. 19-37. That is precisely the claim that petitioners have failed to preserve here.

2. As the government has explained (Br. 63), petitioners' proposed specific intent requirement would not cure the First Amendment problems that they perceive. Petitioners agree with this much, saying only that if the challenged provisions are interpreted to require specific intent, "the injunction against applying the provisions to plaintiffs' proposed speech could be sustained on statutory grounds," and the Court would not have to reach

the constitutional questions in this case. Reply Br. 40. But the government has not conceded that all the petitioners currently lack, or will lack in the future, the specific intent to further unlawful terrorist activities. See Anti-Defamation League Amicus Br. 23 (describing how one of the petitioners, the World Tamil Coordinating Committee, assists in raising funds for the LTTE). If petitioners have this intent, their avoidance strategy will avoid nothing at all in this case (let alone in any others): they will continue to press their vagueness claims.

3. Nor is petitioners' proposal to amend the statute as modest as they try to make it appear. Petitioners argue that this Court should construe "the challenged provisions" to require specific intent. Reply Br. 40. But they do not explain why a specific intent requirement would apply only to challenged terms like "training," "expert advice or assistance," "personnel," or "service." Earlier in this litigation, petitioners sought to give financial support to the PKK and LTTE, see *id.* at 32 n.14; they do not concede (*ibid.*) that the statute is constitutional as applied to monetary contributions; and nothing will prevent others from arguing in the future that monetary contributions also have a communicative element. By petitioners' logic, any provision of the statute capable of reaching conduct with an expressive component should require proof of specific intent.

Moreover, petitioners incorrectly argue that this Court can construe the challenged terms to require specific intent only when they are "applied to speech." Reply Br. 40; see *id.* at 41-42. But in *Clark* v. *Martinez*, 543 U.S. 371 (2005), this Court held that when a statute is given a limiting construction to avoid constitutional concerns, that construction applies to future cases "whether or not those constitutional problems pertain to

the particular litigant before the Court." *Id.* at 381. Contrary to petitioners' proposal, the meaning of the terms in the material-support statute cannot vary depending on whether they are being "applied to speech." If petitioners are correct, then all prosecutions for rendering particular types of material support to foreign terrorists will require proof of specific intent.

4. Finally, and most importantly, petitioners' interpretation conflicts with Congress's intent. Congress adopted a specific intent requirement in Sections 2339A and 2339C, but not in Section 2339B. Petitioners argue (Reply Br. 41-42) that there is no evidence Congress deliberately rejected such a requirement in Section 2339B, but that is not the case. Congress amended Section 2339B years after the enactment of Sections 2339A and 2339C, yet it opted for a different scienter requirement that does not require specific intent—and it did so in the face of a judicial conflict over that very issue. See Gov't Br. 65. Congress apparently thought that Section 2339A's prohibition on providing material support to terrorists was not sufficiently effective, and it therefore chose not to replicate the provision's specific intent requirement. See CACL Amicus Br. 8-9. Indeed, if Section 2339B were interpreted to include a specific intent requirement, it would become almost wholly duplicative of Section 2339A. In those circumstances, petitioners' request for avoidance amounts to little more than "a license * * * to rewrite language enacted by the legislature." *Albertini*, 472 U.S. at 680.

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The judgment of the court of appeals should be reversed insofar as it held certain terms in Sections 2339A and 2339B unconstitutionally vague and in all other respects affirmed.

Respectfully submitted.

ELENA KAGAN
Solicitor General

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